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5 DARRYL BURHARDT,
6 Plaintiff,
7 v.
8 LOUIS ALVAREZ, et al.,
9 Defendants.

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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 Case No. [21-cv-01068-YGR](#) (PR)

15 **ORDER GRANTING PLAINTIFF
LEAVE TO FILE AMENDED
COMPLAINT; DIRECTING
PLAINTIFF TO FILE HIS AMENDED
COMPLAINT; AND DENYING HIS
MOTION FOR PRELIMINARY
INJUNCTION WITHOUT PREJUDICE**

16 Plaintiff, who is currently in custody at Salinas Valley State Prison, filed the present *pro se*
17 civil rights complaint under 42 U.S.C. § 1983. Plaintiff has also filed a motion for leave to
18 proceed *in forma pauperis*, which will be granted in a separate written Order.

19 Before the Court are various motions filed by Plaintiff, including: (1) motions for leave to
20 file an amended complaint; and (2) a motion for a preliminary injunction and a temporary
21 restraining order (“TRO”). Dkts. 2, 5, 8.

22 A plaintiff may amend his complaint once as a matter of course at any time before a
23 responsive pleading is served. *See Fed. R. Civ. P. 15(a)*. Where a plaintiff seeks to amend after a
24 responsive pleading has already been served, however, the decision whether to grant leave to
25 amend is committed to the sound discretion of the trial court. *Waits v. Weller*, 653 F.2d 1288,
26 1290 (9th Cir. 1981). Federal Rule of Civil Procedure 15(a) is to be applied liberally in favor of
amendments and, in general, leave shall be freely given when justice so requires. *Janicki Logging
Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994).

27 The Court notes that the defendants in this action have not been served at this time. As
28 mentioned above, Plaintiff may as a matter of course amend his complaint because a responsive
pleading has not yet been served. *See Fed. R. Civ. P. 15(a)*. The Court finds that it is in the

1 interests of justice to allow Plaintiff to amend his complaint. *See Janicki Logging Co.*, 42 F.3d at
2 566. Accordingly, Plaintiff's motions for leave to file an amended complaint are GRANTED.
3 Dkts. 5, 8. The Court notes that Plaintiff has not attached a proposed amended complaint to his
4 motions. Therefore, the Court directs Plaintiff to file his amended complaint on the attached
5 prisoner civil rights complaint form, as directed below.

6 Plaintiff's motion for a preliminary injunction and a TRO (dkt. 2) is DENIED for failure to
7 satisfying the notice requirements of Federal Rule of Civil Procedure 65. Prior to granting a
8 preliminary injunction, notice to the adverse party is required. Fed. R. Civ. P. 65(a)(1). A motion
9 for preliminary injunction therefore cannot be decided until the parties to the action are served,
10 and they have not yet been served here. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). "A
11 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,
12 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
13 equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural
14 Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). A TRO may be granted without written
15 or oral notice to the adverse party or that party's attorney if: (1) it clearly appears from specific
16 facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or
17 damage will result to the applicant before the adverse party or the party's attorney can be heard in
18 opposition, and (2) the applicant's attorney (plaintiff himself in this case, as he proceeds pro se)
19 certifies in writing the efforts, if any, which have been made to give notice and the reasons
20 supporting the claim that notice should not be required. Fed. R. Civ. P. 65(b). Plaintiff has not
21 satisfied the aforementioned requirements. Furthermore, the Court has granted Plaintiff leave to
22 amend his complaint and once he files his amended complaint, then the Court must first screen it
23 for cognizable claims. *See 28 U.S.C. § 1915A(a)*. In its review, the Court must identify any
24 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon
25 which relief may be granted or seek monetary relief from a defendant who is immune from such
26 relief. *See id. § 1915A(b)(1),(2)*. Until the Court is able to determine whether the forthcoming
27 amended complaint contains cognizable claims, Plaintiff's motion for a preliminary injunction is
28 premature. Accordingly, the motion is DENIED without prejudice. Dkt. 2.

CONCLUSION

For the reasons outlined above, the Court rules as follows:

1. Plaintiff's motions for leave to file an amended complaint are GRANTED. Dkts. 5,
8. Within **twenty-eight (28) days** from the date of this Order, Plaintiff shall file his Amended
Complaint. Plaintiff must use the attached civil rights form, write the case number for this
action—Case No. 21-cv-01068-YGR (PR)—on the form, clearly label the complaint “Amended
Complaint,” and complete all sections of the form. Because the Amended Complaint completely
replaces the original complaint, Plaintiff must include in it all the claims he wishes to present. *See*
Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.), *cert. denied*, 506 U.S. 915 (1992). He may not
incorporate material from the original complaint by reference. **If Plaintiff fails to file his
Amended Complaint by the aforementioned deadline, then the Court will proceed by
reviewing the original complaint filed in this action.**

2. Plaintiff's motion for a preliminary injunction and a TRO is DENIED without prejudice. Dkt. 2. The Court will conduct an initial screening of the amended complaint once it is filed by Plaintiff. In the event the matter proceeds to briefing, Plaintiff may resubmit his motion for a preliminary injunction after Defendants have been served.

3. The Clerk of the Court shall send Plaintiff a blank civil rights complaint form and along with a copy of this Order.

4. This Order terminates Docket Nos. 2, 5 and 8.

IT IS SO ORDERED.

Dated: July 23, 2021

Yvonne Gonzalez Rogers
JUDGE YVONNE GONZALEZ ROGERS
United States District Judge